

Members

Sen. Luke Kenley, Chairperson
Sen. Roberk Jackman
Sen. David Long
Sen. John Broden
Sen. Glenn Howard
Sen. Larry Lutz
Rep. Ben GiaQuinta, Vice-Chairperson
Rep. Robert Kuzman
Rep. Vern Tincher
Rep. Woody Burton
Rep. Ralph Foley
Rep. Michael Smith



INTERIM STUDY COMMITTEE ON LIEN RECOVERY

Legislative Services Agency
200 West Washington Street, Suite 301
Indianapolis, Indiana 46204-2789
Tel: (317) 233-0696 Fax: (317) 232-2554

LSA Staff:

Andrew Roesener, Attorney for the Committee
Mark Goodpaster, Fiscal Analyst for the
Committee

Authority: Legislative Council Resolution 01-02

MEETING MINUTES¹

Meeting Date: October 17, 2002
Meeting Time: 10:00 A.M.
Meeting Place: State House, 200 W. Washington
St., 125
Meeting City: Indianapolis, Indiana
Meeting Number: 2

Members Present: Sen. Luke Kenley, Chairperson; Sen. Roberk Jackman; Sen. David Long; Sen. Glenn Howard; Rep. Vern Tincher; Rep. Woody Burton; Rep. Ralph Foley; Rep. Michael Smith.

Members Absent: Sen. John Broden; Sen. Larry Lutz; Rep. Ben GiaQuinta, Vice-Chairperson; Rep. Robert Kuzman.

Call to Order

Senator Kenley called the meeting to order at 10:10 a.m.

Testimony regarding Indiana mechanic's lien law

Representative Charlie Brown testified that he and his neighbors recently contracted with a third party to concrete their driveways. The third party (general contractor) was paid in full

¹ Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.ai.org/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

by Representative Brown and his neighbors. The general contractor subcontracted with a concrete supplier. Concrete was poured on some of the driveways but the general contractor never paid the concrete supplier. The supplier filed a mechanic's lien against the owners of the property on which the supplier poured concrete. Representative Brown stated that homeowners need to be educated about the use of mechanic's liens. He asked the committee to consider measures to protect homeowners like himself and his neighbors.

Representative Burton asked Representative Brown if a clause in the contract informing them of their right to a no lien contract would have been helpful in his circumstance. Representative Brown responded that it would have been helpful to him. Representative Brown went on to say that he would support legislation that would require inclusion of a clause in all residential construction contracts that explains a homeowner's right to a no lien contract.

Paul Shoopman (President, Dura Builders Inc.) explained that his company incurred a \$300,000 loss because of the filing of mechanic's liens by subcontractors and suppliers who were not paid by a general contractor. Mr. Shoopman stated that the general contractor was paid to develop property owned by Dura Builders Inc. The general contractor did not pay the subcontractors or suppliers and soon after filed for bankruptcy. As a result, the unpaid subcontractors and suppliers filed mechanic's liens on the property. Mr. Shoopman asked the committee to consider two possible amendments to the mechanic's lien law. The first amendment would reduce from 90 days to 60 days the time for filing of a lien notice for commercial projects. The second amendment would require the filing of a 30 day pre-lien notice by subcontractors and suppliers for commercial projects. This requirement currently exists for residential projects.

Senator Long suggested that reducing from 90 days to 60 days the time in which a lien notice may be filed in a commercial setting is an attempt to prevent the filing of a mechanic's lien. Senator Long went on to say that if a 30 day pre-lien notice is required for commercial projects then the time for filing a lien notice should remain at 90 days.

Brock Jordan (attorney with Rubin and Levin) addressed the committee and explained the content and use of a pre-lien notice. Mr. Jordan stated that a pre-lien notice has two parts. It states that the subcontractor or supplier: (1) is on the job; and (2) has lien rights. Mr. Jordan noted that a pre-lien notice is different than the actual filing of a mechanic's lien. He emphasized that current law already requires a pre-lien notice for residential projects, and the request before the committee is to extend the same practice to commercial projects.

Attorney's fees

Brock Jordan urged the committee to consider an amendment to IC 32-28-3-14. This statute governs payment of attorney's fees in mechanic's lien foreclosure actions. A portion of the statute provides that attorney's fees may not be collected by a plaintiff in a foreclosure action if the property owner has paid the full consideration required by the contract. According to Mr. Jordan, the judiciary has interpreted this provision to mean that the property owner can be required to pay the attorney's fees of each plaintiff if any amount is unpaid under the contract. This interpretation applies even if money is withheld because the general contractor has not performed under the contract. Senator Kenley asked Mr. Jordan to prepare amendatory language for IC 32-28-3-14.

Utah lien recovery fund

Joseph Beckman (Indiana Lumber and Building Materials Association) testified concerning the Utah lien recovery fund. Mr. Beckman provided committee members with a two part handout (Exhibit A). He explained that the Utah fund is an improvement upon the Michigan lien recovery fund. He noted that Utah does not require the attorney general to be a party to a foreclosure action. A lien foreclosure action in Utah is essentially the same as a lien foreclosure action in Indiana. The difference arises if it is determined that a homeowner has paid a general contractor and the general contractor has not paid subcontractors and suppliers. In this case any damages awarded to the subcontractors and suppliers would be paid from the fund and not the homeowner. Mr. Beckman also explained additional actions available in Utah against a general contractor who defaults on payments. Utah allows for three actions: (1) the general contractor's license may be suspended; (2) a separate lawsuit may be initiated against the general contractor for recovery of amounts paid out of the fund; and (3) a fine or monetary penalty may be levied against the general contractor.

Mr. Beckman proposed that if Indiana adopts a lien recovery fund that each general contractor and subcontractor should receive a unique identifying number upon payment into the fund. When a building permit is granted the unique identifying number of the contractor would be placed on the building permit. This would provide a mechanism for tracking participation in the fund and would avoid licensing of general contractors in Indiana.

Representative Burton asked Mr. Beckman if lien rights are still available for a subcontractor or supplier who does not participate in the Utah or Michigan fund. Representative Burton followed up by asking if a nonparticipating subcontractor or supplier can enforce those rights against a homeowner. Mr. Beckman responded that he believes lien rights are available for nonparticipants and can be enforced against homeowners.

General discussion

Senator Kenley asked committee members for recommendations for inclusion in the final report. He then read copies of two preliminary drafts of bills that were distributed to members of the committee. The first draft, authored by Senator Kenley, imposes a duty to mitigate on a subcontractor who knows or reasonably should know that a general contractor is defaulting on payments. The second draft, authored by Representative Burton, prevents a subcontractor or supplier from obtaining a mechanic's lien if a homeowner pays a general contractor in full for certain construction projects. Representative Burton then noted that filing of a lien notice should uniformly be 60 days.

Representatives Smith and Foley urged that the final report should highlight the problems with the mechanic's lien law that were presented to the committee.

Senator Kenley asked for a vote on the final report. The committee approved the final report. Senator Kenley asked for consent to allow him and Andy Roesener (attorney for the committee) to jointly draft the final report. Consent was given by the committee.

Adjournment

Senator Kenley adjourned the meeting at 11:35 a.m.